IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27963

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY Petitioner, vs. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT Respondents.	REPLY BRIEF OF PETITIONER

ROBERT L. RUSSEL
District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

MILTON K. BLAKEY
Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
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STATUTES

Colorado Revised Statutes, 1973, as amended
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Ohio Revised Code
Section 2929.04 6

STATEMENT OF THE ISSUES

IS THE COLORADO DEATH PENALTY STATUTE WHICH PROVIDES FOR ADMISSION OF EVIDENCE AND JURY DETERMINATION OF AGGRAVATING AND MITIGATING FACTORS UNCONSTITUTIONAL FOR TOO NARROWLY PERMITTING CONSIDERATION OF MITIGATING FACTORS?

STATEMENT OF THE CASE

On October 26, 1976, a Direct Criminal Information was filed in the District Court in and for the Ninth Judicial District (Criminal Action No. C-1616) charging Theodore Robert Bundy with First Degree Murder, a Class I felony, punishable upon conviction by imposition of the death penalty or life imprisonment, Colorado Revised Statutes, 16-11-103, 1973, as amended.

On April 4 and 5, 1977, a Preliminary Hearing was held and on April 6, 1977, the Court found probable cause and ordered the Defendant, Theodore Robert Bundy, held for trial.

On May 16, 1977, the Defendant filed a Motion to Strike the Death Penalty from Consideration, asking the court to find that Colorado Revised Statute 16-11-103, 1973, as amended is unconstitutional, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The Court considered the argument and briefs of counsel and on December 27, 1977, the Court granted Defendant's motions, holding the statute unconstitutional.

The Court in its Memorandum Opinion and Order held: "Colorado's Statutory sentencing plan is too rigid to satisfy constitutional standards." (Memorandum Opinion at P.11.)

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SUMMARY OF ARGUMENT

THE COLORADO DEATH PENALTY STATUTE WHICH ALLOWS THE JURY TO HEAR EVIDENCE IN AGGRAVATION AND MITIGATION, PROVIDES ADEQUATE STANDARDS AGAINST WHICH TO MEASURE THE DEFENDANT"S RECORD AND CHARACTER THUS PREVENTING ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.

ARGUMENT

Unlike the mandatory death penalty statutes which have consistently been held unconstitutional by the U.S. Supreme Court, Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978 (1976), Stanilaus Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001(1976), and Harry Roberts v. Louisiana ___U.S.___, 97 S. Ct. 1933,(1977), the Colorado statute providing for imposition of the death penalty establishes a bifurcated trial the second phase of which deals specifically with the aggravating and mitigating factors relevant to both the offense and the offender. Such a

procedure removes from the jury the unbridled discretion that was condemmed in Furman v. Georgia, 408 U.S. 238, 92 S. Ct., 2726 (1972)

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Should this court adopt a similar interpretation permitting wide open introduction of character and reputation evidence and argument, this requirement would be satisfied as it is not necessary for a Colorado jury to find a mitigating factor to avoid the death penalty. It is only if an aggravating factor is found without a mitigating factor that the death penalty can be imposed. It is clear that broad interpretation of the mitigating factors would make virtually all evidence of character and record admissable.

In Proffit v. Florida, the Florida statute was examined. It provided for application of the death penalty if the court, after advisory vote of the jury, finds that the mitigating factors outweigh the aggravating factors. The Florida statute enumerates eight aggravating factors to which the court is limited and lists six mitigating factors but does not specifically limit the court to consideration of these factors.

Two clear and important distinctions should be drawn between this statute and the Colorado statute. First, it is not applied by a jury except in an advisory capacity. Second, a finding of a mitigating factor, statutory or otherwise, does not bar application of the death sentence.

I would suggest, therefore, that what the court is permitting here is wide latitude in the introduction of evidence that may affect the court's (jury's) finding of statutory aggravating or statutory mitigating factors. To do otherwise would make intelligent and meaningful jury instructions impossible and would surely lead us back into pre-Furman uncertainty.

Interpretation of the Colorado statute to allow broad latitude in introduction of evidence would effect the same result.

The Texas procedure examined in Jurek v. Texas was considerably different. The Texas statute did not establish a list of aggravating and mitigating factors, but rather gave the jury three interrogatories:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
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that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." 96 S. Ct. at 2955

The court simply held that as interpreted by the Texas court, the second question brought before the jury "whatever mitigating circumstance relating to the individual defendant can be adduced". 42 U.S. 2628, at 276

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Here a plurality of four Justices concurred in holding that the Ohio statute was invalid as it precluded consideration "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett v. Ohio, Cr.L.3215, at 3220.

Let us then consider the evidence admissable and the applicability of the mitigating factors in the Colorado statute Colorado Revised Statutes, 16-11-103, (5), 1973, as amended, provides:

"(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:
(a) He was under the age of eighteen; or
(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
(d) He was a principal in the offense, which was committed by another but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

All of these factors are relevant to the defendant's character. While age is in and of itself a mitigating factor only if he is under eighteen. His age, education and experience in life, including the absence of prior criminal activity, are all certainly relevant as bearing upon his "capacity to appreciate wrongfulness of his conduct" and his ability to forsee that "the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person".

The Ohio statute provides a set of criteria for imposition of the death penalty after one has been found guilty of aggravated murder. These are set out in section 2929.04 of the Ohio Revised Code as follows:

"§2929.04 Criteria for imposing death or imprisonment for a capital offense.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:
(1) The offense was the assassination of the president of the United States or person in line or succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
(2) The offense was committed for hire.
(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punnishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:
(1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The first seven of these factors are the aggravating factors which pertain to the nature of the offense. The last three are focused upon the offender. As it can readily be seen here, the factors do not take account of the individual participation in the crime, so that one who is a complicitor in a felony murder cannot avoid the death penalty even though the killing was not foreseeable or his participation was minor. It likewise does not consider the age of the defendant nor his capacity to appreciate the wrongfulness of his actions.

In regard to this limitation, the court held:

> ". . . The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." 23 Cr.L. 3215 at 3221.

In this respect, the concurring opinions of Mr. Justice Blackmun and Mr. Justice White are even more pungent. Mr. Justice Blackmun states:

> "The more manageable alternative, in my view, is to follow a proceduralist tact, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. . . . A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force . . ." 23 Cr.L. 3215, 3224

Colorado does not suffer such deficiency. It provides for the "unforeseeable" result and "minor involvement" which is obviously a prime consideration in the Lockett case.

CONCLUSION

It is well settled that the death penalty is not per se cruel and unusual and is held so only when the procedures established for its application are so broad as to create a risk that "arbitrary", "capricious" or "freakish" application will result. This is clearly not the case in Colorado as our statute provides clear guidelines focusing the attention of the sentencing body on the "character and record of the individual offender and the circumstances of the particular offense".

It is therefore submitted that Colorado Revised Statute 16-11-103, 1973, as amended is constitutional and the rule is this case should be made absolute.

Respectfully submitted,

ROBERT L. RUSSEL (3043)
District Attorney
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Milton K. Blakey (2691)
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20 E. Vermijo St.
Suite 310
Colorado Springs, Colorado 80903

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing to Kevin O'Reilly, Box 1635, Glenwood Springs, Co., 81601, Hon. George E. Lohr, District Court Judge, Pitkin County Courthouse, Aspen, CO 81611 and the Supreme Court of the State of Colorado, 2 E. 14th Avenue, Denver, Colorado 80203, this 25th day of July, 1978.

Micah Collins

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No. 27963

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY Petitioner, vs. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT Respondents.	REPLY BRIEF OF PETITIONER

ROBERT L. RUSSEL
District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

MILTON K. BLAKEY
Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

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STATEMENT OF THE ISSUES

IS THE COLORADO DEATH PENALTY STATUTE WHICH PROVIDES FOR ADMISSION OF EVIDENCE AND JURY DETERMINATION OF AGGRAVATING AND MITIGATING FACTORS UNCONSTITUTIONAL FOR TOO NARROWLY PERMITTING CONSIDERATION OF MITIGATING FACTORS?

STATEMENT OF THE CASE

On October 26, 1976, a Direct Criminal Information was filed in the District Court in and for the Ninth Judicial District (Criminal Action No. C-1616) charging Theodore Robert Bundy with First Degree Murder, a Class I felony, punishable upon conviction by imposition of the death penalty or life imprisonment, Colorado Revised Statutes, 16-11-103, 1973, as amended.

On April 4 and 5, 1977, a Preliminary Hearing was held and on April 6, 1977, the Court found probable cause and ordered the Defendant, Theodore Robert Bundy, held for trial.

On May 16, 1977, the Defendant filed a Motion to Strike the Death Penalty from Consideration, asking the court to find that Colorado Revised Statute 16-11-103, 1973, as amended is unconstitutional, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The Court considered the argument and briefs of counsel and on December 27, 1977, the Court granted Defendant's motions, holding the statute unconstitutional.

The Court in its Memorandum Opinion and Order held: "Colorado's Statutory sentencing plan is too rigid to satisfy constitutional standards." (Memorandum Opinion at P.11.)

On December 30, 1977, Petitioner filed this Original Proceeding and on January 5, 1978, this Court granted a Rule to Show Cause.

Respondents, after a considerable extension of time, filed their brief on April 27, 1978, and Petitioner was granted until July 15, 1978, to reply. Due to the decision in Lockett v. Ohio, decided July 3, 1978, the Court granted Petitioner until July 25, 1978, to file its reply.

The defendant, Theodore Robert Bundy, escaped from Garfield County Jail on December 31, 1977, and was recaptured in Florida where he now faces state charges. Extradition proceedings have been commenced and Governor Richard Lamm has sent his requisition to Governor Askew of Florida.

The defendant is not now in Colorado custody and no trial date has been set.

SUMMARY OF ARGUMENT

THE COLORADO DEATH PENALTY STATUTE WHICH ALLOWS THE JURY TO HEAR EVIDENCE IN AGGRAVATION AND MITIGATION, PROVIDES ADEQUATE STANDARDS AGAINST WHICH TO MEASURE THE DEFENDANT"S RECORD AND CHARACTER THUS PREVENTING ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.

ARGUMENT

Unlike the mandatory death penalty statutes which have consistently been held unconstitutional by the U.S. Supreme Court, Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978 (1976), Stanilaus Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001(1976), and Harry Roberts v. Louisiana ___U.S.___, 97 S. Ct. 1933,(1977), the Colorado statute providing for imposition of the death penalty establishes a bifurcated trial the second phase of which deals specifically with the aggravating and mitigating factors relevant to both the offense and the offender. Such a

procedure removes from the jury the unbridled discretion that was condemmed in Furman v. Georgia, 408 U.S. 238, 92 S. Ct., 2726 (1972)

In several opinions since Furman, the Supreme Court has analyzed statutes and approved them as satisfying the mandates of the Eighth and Fourteenth Amendments.

The most recent decisions are Lockett v. Ohio U.S.___, 23CRL 3215, and Bell v. Ohio U.S.___, 23CRL 3229 (July 3, 1978) The court in Lockett v. Ohio, supra, looked to Gregg v. Georgia 428 U.S. 153, 96 S. Ct. 2909 (1976), Proffit v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976) and Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950 (1976), to point out the inadequacy of the Ohio statute.

In Gregg v. Georgia, the court reviewed the Georgia statute which enumerates ten possible aggravating factors but does not enumerate mitigating factors. The court held that because the Georgia Supreme Court had approved broad introduction of mitigating evidence along with the requirement that one of the statutory aggravating factors be found before a death sentence could be recommended satisfied the mandates for guidance and direction.

Should this court adopt a similar interpretation permitting wide open introduction of character and reputation evidence and argument, this requirement would be satisfied as it is not necessary for a Colorado jury to find a mitigating factor to avoid the death penalty. It is only if an aggravating factor is found without a mitigating factor that the death penalty can be imposed. It is clear that broad interpretation of the mitigating factors would make virtually all evidence of character and record admissable.

In Proffit v. Florida, the Florida statute was examined. It provided for application of the death penalty if the court, after advisory vote of the jury, finds that the mitigating factors outweigh the aggravating factors. The Florida statute enumerates eight aggravating factors to which the court is limited and lists six mitigating factors but does not specifically limit the court to consideration of these factors.

Two clear and important distinctions should be drawn between this statute and the Colorado statute. First, it is not applied by a jury except in an advisory capacity. Second, a finding of a mitigating factor, statutory or otherwise, does not bar application of the death sentence.

I would suggest, therefore, that what the court is permitting here is wide latitude in the introduction of evidence that may affect the court's (jury's) finding of statutory aggravating or statutory mitigating factors. To do otherwise would make intelligent and meaningful jury instructions impossible and would surely lead us back into pre-Furman uncertainty.

Interpretation of the Colorado statute to allow broad latitude in introduction of evidence would effect the same result.

The Texas procedure examined in Jurek v. Texas was considerably different. The Texas statute did not establish a list of aggravating and mitigating factors, but rather gave the jury three interrogatories:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence

that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." 96 S. Ct. at 2955

The court simply held that as interpreted by the Texas court, the second question brought before the jury "whatever mitigating circumstance relating to the individual defendant can be adduced". 42 U.S. 2628, at 276

Again the court looked to liberal state court interpretation to find adequate standards and safeguards.

The most recent opinions Lockett v. Ohio, S. Ct. No. 76-6997, 23 Cr.L3215, (decided July 3, 1978), and Bell v. Ohio S. Ct. No. 76-6513, 23 Cr.L3229 (decided July 3, 1978), examined the Ohio death penalty statute and held it unconstitutional.

Here a plurality of four Justices concurred in holding that the Ohio statute was invalid as it precluded consideration "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett v. Ohio, CrL.3215, at 3220.

Let us then consider the evidence admissable and the applicability of the mitigating factors in the Colorado statute Colorado Revised Statutes, 16-11-103, (5), 1973, as amended, provides:

"(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:
(a) He was under the age of eighteen; or
(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
(d) He was a principal in the offense, which was committed by another but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

All of these factors are relevant to the defendant's character. While age is in and of itself a mitigating factor only if he is under eighteen. His age, education and experience in life, including the absence of prior criminal activity, are all certainly relevant as bearing upon his "capacity to appreciate wrongfulness of his conduct" and his ability to forsee that "the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person".

The Ohio statute provides a set of criteria for imposition of the death penalty after one has been found guilty of aggravated murder. These are set out in section 2929.04 of the Ohio Revised Code as follows:

"§2929.04 Criteria for imposing death or imprisonment for a capital offense.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:
(1) The offense was the assassination of the president of the United States or person in line or succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
(2) The offense was committed for hire.
(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punnishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:
(1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The first seven of these factors are the aggravating factors which pertain to the nature of the offense. The last three are focused upon the offender. As it can readily be seen here, the factors do not take account of the individual participation in the crime, so that one who is a complicitor in a felony murder cannot avoid the death penalty even though the killing was not foreseeable or his participation was minor. It likewise does not consider the age of the defendant nor his capacity to appreciate the wrongfulness of his actions.

In regard to this limitation, the court held:

> ". . . The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." 23 Cr.L. 3215 at 3221.

In this respect, the concurring opinions of Mr. Justice Blackmun and Mr. Justice White are even more pungent. Mr. Justice Blackmun states:

> "The more manageable alternative, in my view, is to follow a proceduralist tact, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. . . . A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force . . ." 23 Cr.L. 3215, 3224

Colorado does not suffer such deficiency. It provides for the "unforeseeable" result and "minor involvement" which is obviously a prime consideration in the Lockett case.

CONCLUSION

It is well settled that the death penalty is not per se cruel and unusual and is held so only when the procedures established for its application are so broad as to create a risk that "arbitrary", "capricious" or "freakish" application will result. This is clearly not the case in Colorado as our statute provides clear guidelines focusing the attention of the sentencing body on the "character and record of the individual offender and the circumstances of the particular offense".

It is therefore submitted that Colorado Revised Statute 16-11-103, 1973, as amended is constitutional and the rule is this case should be made absolute.

Respectfully submitted,

ROBERT L. RUSSEL (3043)
District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for the
Ninth Judicial District of Colorado

Milton K. Blakey (2691)
Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for the
Ninth Judicial District of Colorado
20 E. Vermijo St.
Suite 310
Colorado Springs, Colorado 80903

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing to Kevin O'Reilly, Box 1635, Glenwood Springs, Co., 81601, Hon. George E. Lohr, District Court Judge, Pitkin County Courthouse, Aspen, CO 81611 and the Supreme Court of the State of Colorado, 2 E. 14th Avenue, Denver, Colorado 80203, this 25th day of July, 1978.

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